IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

NO. 20,030

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF A REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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ON PETITION FOR REVIEW OF A REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This petition was filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a). It seeks review of a Report and Order released July 29, 1964, (R. Vol. II-C, pp. 779-826) 29 Fed. Reg. 11099, adopting certain amendments to part 19 (now part 95) of the Commission's Rules, and from a Memorandum Opinion and Order released on March 1, 1965, (R. Vol. II-E, pp. 1080-1099), 30 Fed. Reg. 2706, in which the Commission, on reconsideration, adhered to its earlier determination. The jurisdiction of this Court rests on Section 402(a) of the Communications Act, as amended, 47 U.S.C. 402(a), and the Judicial

Review Act, 5 U.S.C. 1031-1042. Venue in this judicial circuit is based on 5 U.S.C. 1033.

COUNTERSTATEMENT OF THE CASE

Because petitioner's statement of the case is incomplete and misleading it is felt that the Court would be assisted by a counterstatement.

The Citizens Radio Service is one of a number of "Safety and Special Radio Services" that have been established by the Federal Communications Commission. Other such services include, e.g., Marine, Aviation, Industrial, Amateur, and Public Safety. These services involve nationwide and international uses of radio by persons, businesses, state and local governments and other organizations licensed to operate communications systems for their own use as an adjunct to their primary business or other activity. 31 Fed. Reg. 6831, 6832 (1966)

The orders under review deal with the promulgation of rules affecting the Citizens Radio Service, particularly as they relate to the kind of messages that may be transmitted, the frequencies that may be used and the length of time prescribed for transmissions and for intervals between transmissions. We think it would be useful as part of this Counterstatement to trace in summary fashion the development of this service from its origin in 1945. We will then turn to the immediate facts which gave rise to this appeal.

Background. The Citizens Radio Service originated in 1945 when the Commission, after a series of extensive inquiries and hearings, allocated a portion of the radio spectrum (460-470 mc/s) for a new "Citizens Radio-communications Service." 10 Fed. Reg. 901. It was pointed out at that time that while the possible uses of the Citizens Radio Service were "as broad as the imagination of the public and the ingenuity of equipment manufacturers could devise," this new service was primarily designed for both personal and business uses of private citizens, particularly where other means of communication were not available. It was intended for essential, local communications such as those entailed in the operation of department stores, farms and construction projects. See Federal Communications Commission Annual Report p. 68. (1945).

On October 23, 1947 the Commission adopted new technical rules designed to provide, inter alia, for private short range radio communication with minimal licensing requirements. 12 Fed. Reg. 7081. The licensing and administrative procedures for the new service were adopted on March 31, 1949. 14 Fed. Reg. 1596. Originally, limitations on usage were kept at a minimum in order to foster development of the service. However, when the rules were codified in 1949, certain prohibitions on the types of communications allowed in the Citizens Radio Service were set forth. Section 19.59, 14 Fed. Reg. 1599, required, e.g., that each station communicate only with other stations in the Citizens

Service; that all communications should be limited to the minimum practicable transmission time, and that no station could be used to carry communications for hire or in connection with radio broadcasting.

In 1958, the Commission revised the rules and established a new class of station (Class D) which was authorized to operate on certain frequencies in the 27 megacycle band.[1/] This new category of station was created to fulfill an apparent and increasing need for short-distance voice communication by radio for personal or business use. 23 Fed. Reg. 6128. Until this time the Citizens Service was relatively free of enforcement problems, but with the allocation of the 27 mc band and the creation of the Class D category, the Commission's difficulties began. See 27 Fed. Reg. 11,500 (1962).

Because the 27 mc band has sporadic long distance transmission characteristics, thus enabling a licensee to make contacts with other stations at great distances from his home base, and because equipment for operation of a Class D station in this range of frequencies was cheaper and simpler than equipment for the other classes of citizens stations, an ever increasing number of applicants

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1/ There are three other classes of stations in the Citizens Service Class A, B, and C. 47 CFR 95.3(b) (1966). Each of these categories of stations has different kinds of authorized operation on different frequencies. 47 CFR 95.6 (1966). For purposes of this case, however, only Class D stations, which are more than 90% of the total number at present, need be considered.

applied for Class D licenses. Eligibility standards were low, with an applicant being required only to be a United States citizen, 18 years of age or older. No examination was required, nor was any technical knowledge by the applicant needed. See 47 CFR 95.7 and 95.13 (1966). Within a year, approximately 15,000 Class D station licenses had been granted (of approximately 50,000 Citizens Service licenses overall).

On July 22, 1959, the Commission began a proceeding looking toward amendment of its rules dealing with permissible communications in the Citizens Service, 24 Fed. Reg. 6059. This action was prompted by an awareness that a substantial number of Class D station licensees were engaging in hobby-type activities, lengthy transmissions of idle chatter, and long distance contacts, commonly called "skips," all contrary to the original purpose and intent of the Citizens Radio Service. It was the Commission's view that such communications were inimical to the public interest since they resulted in intolerable interference to those licensees who had a definite and legitimate need for short distance radio communication and who restricted their use of the allocated frequencies to purposes permitted by the rules. In adopting the new amendments, 25 Fed.Reg. 1408 (1960) the Commission spelled out in detail the types of operations which would be permitted and expressly stated that hobby-type communications were contrary to the purposes of the Service and must be prohibited.

The rules, as adopted, reflected the Commission's intention that citizens radio communications generally be used for intercommunications between units of a single station, rather than for communications with other Class D stations or stations operating under other parts of the Commission's rules, and that they be restricted to useful and substantive messages related to the business or personal activities of the individuals concerned. (25 Fed. Reg. 1411). Also, communications from Class D stations were required to be addressed to specific persons or stations at short distances; communications to random or unknown stations were prohibited; and a duration was placed on the length of the communication. Ibid.

In denying petitions to reconsider these prohibitions the Commission again pointed out that the use of a citizens radio station as a hobby, or for the amusement of the operator, was entirely inconsistent with the original purpose of the Citizens Radio Service, and was therefore not authorized. 19 Pike & Fischer, R.R. 1554 (1960). And since 1959, Class D authorizations issued by the Commission have normally been accompanied by information bulletins stressing this fact.

The Present Proceeding. By November, 1962, there were 310,000 Class D licenses outstanding, comprising about 84% of the entire Citizens Radio Service. Increased misuse of the Service prompted the Commission to consider a further amendment to the rules, and in November 1962, another Notice of Proposed Rule Making was issued.

(R. Vol. I-A, pp. 3-31). The new proposal was designed, inter alia, to enunciate even more clearly the prohibited and permissible uses of the Citizens Service in accordance with its original purposes. At this time the Commission pointed out that the widespread abuse by licensees of operating privileges, if left unchecked, would inevitably destroy the utility of the Service.

In response to the Notice over 2,500 comments, representing many divergent views, were received and analyzed by the Commission. The views of those who urged that the rules be liberalized and that hobby-type communications be permitted were carefully considered. But only July 29, 1964, a Report and Order was issued adopting the new rules and reaffirming the Commission's earlier determination that the use of these frequencies must be confined to essential business and personal communications (R. Vol. II-C, pp. 779-826). The Commission's opinion states:

> There are many reasons why the public interest would not be served by opening the Citizens Radio Service to hobby type use, the principal one of which is that, because of the limited number of frequencies available, it is essential that the most effective and productive use for public purposes must be made. Hobbying is not consistent with such purposes. However, there is a need by a substantial segment of the public for radiocommunication for business and personal needs within the purview of the rules as adopted herein. Further, the very nature of hobby type communications is such as to generate greater use of the frequencies to the substantial detriment of other more purposeful uses. Moreover, it seems clear that the use of frequencies for hobby type purposes, if permitted, would generate

> additional usage far beyond the limits of frequencies now available.
>
> In this connection, a number of comments urged that hobbying be permitted in the Citizens Radio Service because it would provide encouragement to young people to increase their technical knowledge and perhaps make a career in electronics and other scientific fields. While these are laudable objectives, they can be accomplished in the Amateur Radio Service where existing rules provide for that type of use. (Footnote omitted.)(R. Vol. II-C, pp. 780-781; 29 Fed. Reg. 11,100 (1964) .

A new section was added to the rules which elaborated on the more important prohibited uses of the Citizens Service, including the use of the service for engaging in radio-communications as a hobby or diversion. Thus, operation of the stations as an activity in and of itself was now expressly prohibited.[2/] 47 CFR 95.83(a)(1) (1966). A provision also made it clear that discussions by licensees of signal strength and frequency stability reports, with exceptions, were specifically prohibited, inasmuch as the Commission ascertained that many violations had involved a hobby-type discussion about the technical performance of the kind of radio equipment being used. 29 Fed. Reg. 11,103; 47 CFR 95.83(a)(13) (1966).

2/ Since the majority of abuses of station operating privileges occurred during communications between stations of different licensees, 7 specific frequencies out of 23 frequencies were reserved exclusively for interstation communication in order to facilitate enforcement. However, all licensees communicating with units of their own station (intrastation) could use any of the 23 frequencies reserved for Class D usage. 29 Fed. Reg. 11,101; 47 CFR 95.41 (1966). Moreover, the new rules limited the duration of communications, 47 CFR 95.91 (1966), and prohibited communications with other units more than 150 miles away. 47 CFR 95.83(b) (1966).

The Commission also rejected the contention that the proposed rules would be in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. 326, and were an unconstitutional abridgment of "freedom of speech":

> Section 303(a) and (b) of the Communications Act authorize the Commission, as the public convenience, interest or necessity requires to classify radio stations and prescribe the nature of the service to be rendered by each class of licensed station. The very creation of the Citizens Radio Service and the establishment of the Class D station are founded in this authority. Therefore, each licensee is limited to the service authorized by his license and prescribed by our regulations governing that service. The authority to prescribe the nature of the service perforce includes the authority to spell out the communications and uses that are not permitted. Thus, the rules adopted herein are plainly within the Commission's regulatory authority. (R. Vol. II-C, p. 782; 29 Fed. Reg. 11,100 (1964).

Various parties, including the petitioner herein, requested reconsideration, alleging that the new rules (a) unconstitutionally abridged freedom of speech; (b) constituted censorship in violation of Section 326 of the Communications Act; (c) were unlawful by reason of their vagueness; (d) were arbitrary, capricious, and not in the public interest, primarily because of the failure to provide for hobby-type operations; (e) violated the Communications Act by amending existing licenses without an evidential hearing; (f) violated the Fifth Amendment to the Constitution in that they deprive licensees of the full use of their property without procedural due process; and (g) violated the Administrative Procedure Act

since rule changes were adopted which were not contained in the Notice of Proposed Rule Making.

The Commission considered at length each of these issues. (R. Vol. II-E, pp. 1089-1097). It again emphasized why the rules violated neither the First Amendment nor Section 326 of the Communications Act. As of July 1, 1964, noted the Commission, there were 700,000 holders of Class D citizens licenses, and, manifestly, the available frequencies had to be limited to the most deserving and needful purposes. Relying on Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. 303(g) and the Supreme Court's decision in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Commission concluded that the specified restrictions were both legal and proper.

Responding to charges of "vagueness", the Commission pointed out that the rules did not substantially alter the policy which had prevailed in the Citizens Service since its inception. Concluding that the rules could be understood by a person of average prudence the Commission nevertheless adopted a "note" setting forth numerous illustrations of prohibited transmissions. (R. Vol. II-E, pp. 1086-1090); see note to 47 C.F.R. 95.83(a)(1).

It was also argued that the amendment to Section 95.41(d) would change the frequencies available to Class D citizens stations and that proposed Section 95.91(b) would change the times of operations and that such changes, without the hearing required by Section 303(f) of the Act or consent of the licensees would be illegal.

The 95.41(d) amendment restricts inter-station transmissions to seven specified frequencies of the 23 available to Class D licensees. Since all 23 channels would remain available for intra-station use, the Commission found that no "change in frequency" such as Section 303(f) [3/] contemplates had taken place.

New Section 95.91(b) would have the effect of lengthening the already existing "silent period" after each transmission from two to five minutes. The Commission concluded that such a change is not a change "in the time of operation" within the meaning of Section 303(f) since the licensee is free to operate, as before, 24 hours a day, [4/] subject as always to limitations resulting from the shared use of the frequencies and to the requirement that the communications be of an essential business or personal nature.

3/ Section 303(f) reads: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of the Act will be more fully complied with." 47 U.S.C. Section 303(f).

4/ The Commission also considered the allegation that aside from the hearing requirements of Section 303(f), a change in the permissible communications would necessitate a hearing under Section 316 of the Act. It was concluded that the same reasoning which obviated the need for a 303(f) hearing rendered unnecessary a 316 hearing.

In any event, said the Commission, no hearing would be required by Section 303(f) because all petitioners had ample opportunity to supply information and views on the proposed amendments. The information and comments submitted on the new sections by a substantial number of persons were considered by the Commission in reaching its decision. These disclosed no substantial and material factual issues, so that in the Commission's view no useful purpose would be served by an evidentiary hearing. In addition, the Commission pointed out the practical difficulties involved in attempting to effect the changes of this nature by any means other than general rule making in view of the number of licensees involved. (R. Vol. II-E, pp. 1092-95).

The Commission concluded that it had complied with all the pertinent requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. Section 1003 since all interested persons had had an opportunity to present their views. Sections 7 and 8 of the A.P.A., 5 U.S.C. Sections 1006, 1007 were not applicable, said the Commission, since no statute requires that the rules in question be made on the record after opportunity for an agency hearing (R. Vol. II-E, p. 1096). Also considered and rejected were arguments challenging the constitutionality of the new regulations and the sufficiency of notice of the changes proposed. (R. Vol. II-E, pp. 1096-97).

Following this decision, on April 19, 1965 an appeal was taken to the United States Court of Appeals for the Second Circuit, and at the same time an injunction pendente lite was requested. The Court, however, went immediately to the merits of the case and after argument affirmed the Commission. Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2nd Cir., 1965). The Court found without merit the challenge to the prohibition on hobbying and squarely held that neither Section 326 of the Communications Act nor the First Amendment were violated.. Similarly the Court found "no sufficient force in the claim of unconstitutional vagueness."

On April 26, 1965, the same day that the Lafayette case was decided, in the Second Circuit, this petition for review was filed.

QUESTIONS PRESENTED

In the Commission's view the following questions are presented:

1. Whether the Commission's rules imposing restrictions on the use of certain frequencies assigned to the Citizens Band Service constitute illegal or unconstitutional restrictions on freedom of speech;

2. Whether the rule making procedure followed in this case deprived petitioner of any procedural rights under the Communications Act or the Administrative Procedure Act.

STATUTES INVOLVED

Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003;

Sections 303 (a), (b), (f) and (g), 316, 326 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 303 (a), (b), (f) and (g), 316, 326 and 405.

Pertinent portions of these statutory provisions are set forth as an appendix hereto.

SUMMARY OF ARGUMENT

Reasonable limitations on the types of communication which may be transmitted on the frequencies allocated to the Citizens Band Service are clearly within the Commission's authority, and are not in conflict either with the First Amendment or with Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. section 326. These frequencies are currently assigned to hundreds of thousands of users, and restrictions on their use are imperative if the maximum efficient use of a scarce resource is to be realized. Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2nd Cir., 1965); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

Sections 303(a) and (b) of the Communications Act of 1934, as amended, 47 U.S.C. sections 303(a) and (b) empower the Commission to classify radio stations and to prescribe the nature of the service to be rendered by each class. Section 303(g) of the Act, 47 U.S.C. section 303(g), mandating the Commission to "encourage the larger and more effective use of radio" has been held to grant to the Commission authority to impose limitations on the use of the public airwaves. National Broadcasting Co. v. United States, supra.

Petitioner has failed to show that the limitations imposed by the Commission's rules are in any way unreasonable or contrary

to the public interest standard of the Communications Act. Nor are the rules unconstitutionally vague. The present rules work no change in the use to which the Citizen's Band class D service may be put, and the Commission makes every effort to inform licensees of the restrictions on the service.

The Communications Act does not require the Commission to hold evidentiary hearings on individual license modifications before adopting rules of general application to the Citizens Radio Service. Neither section 303(f) nor section 316 of the Act, 47 U.S.C. sections 303(f) and 316 require individual ajudicatory hearings for the kind of rule changes adopted in the proceeding under review here. All affected parties had full opportunity to present their views in a rule making procedure which complied fully with the applicable provisions of the Administrative Procedure Act. It is settled that this kind of procedure is adequate where the promulgation of standards of general applicability is involved, even where a statutory right to a hearing may exist before an individual license may be modified. Federal Power Commission v. Texaco, 377 U.S. 33 (1963); National Broadcasting Co. v. United States, supra; American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966); Superior Oil Co. v. Federal Power Commission, 322 F.2d 601 (9th Cir., 1965). There was no denial of due process in the refusal to grant individual hearings. Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949).

Petitioner had adequate notice under the provisions of section 4 of the Administrative Procedure Act, 5 U.S.C. 1003. The Commission's Notice of Proposed Rule Making contained the substance of the proposed rule or a description of the subject and issues involved. The Commission is not required to publish in advance every precise proposal which may ultimately be adopted. Willapoint Oysters, Inc. v. Ewing, supra; Wilson and Co. v. United States, 335 F.2d 788 (D.C. Cir., 1964), cert denied 380 U.S. 950.

The record is adequate to support the action taken by the Commission. Petitioner did not request of the Commission the production of any material now claimed to be wrongfully withheld. The request is therefore not properly before this court. Section 405 of the Act, 47 U.S.C. section 405; Florida Gulf Coast Broadcasters, Inc. v. Federal Communications Commission, 352 F.2d 726 (D.C. Cir., 1965). In any event, there is no requirement that the proceeding attacked herein be held "on the record". Sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. sections 1006, 1007, on which petitioner relies, are inapposite. It is not necessary in a rule making procedu that the agency submit for the record material which would support it rule making decisions. Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, (D.D.C., 1965), affirmed sub nom. Flying Tiger Line, Inc. v. Murphy, Case No. 19,869 D.C. Cir., decided by Judgment Order issued June 2, 1966. Here the basis for the Commission's action is set forth in the Report and Order adopting the new rules and shows beyond question that the action was a reasonable one.

ARGUMENT

In adopting the rules which are under review in this proceeding, the Commission dealt with a problem of vast proportions. As of April 1965, when the rules became effective, there were more than 800,000 licensees in the Citizens Radio Service, with applications being filed at the rate of approximately 20,000 per month. When the service was established in 1945 its purpose was to provide private citizens with a medium for essential business and personal communications. Twenty years later the Commission reaffirmed its view that the objectives of the Service were still sound. It was increasingly apparent, however, that the service was threatened by widespread and continuous disregard for the applicable rules, particularly the pervasive use of the service for hobbying and "chitchat." The Commission concluded that action had to be taken to clear the airwaves of the clutter which was saturating and destroying the service.

Consequently, the Commission undertook a rule making proceeding pursuant to Section 4 of the Administrative Procedure Act, publishing proposed new rules and soliciting the views of interested members of the public. More than 2,500 comments and petitions were received and analyzed. The Commission carefully considered the many suggestions and alternatives offered by the public, and took into account as well its own experience in the administration of the Citizens Band Service. The result was the 1964 Report and Order (R. Vol. II-C, pp. 779-826) and the 1965 Memorandum Opinion and Order on reconsideration (R. Vol. II-E, pp. 1080-1099) which are under review herein.

Petitioner has challenged the Commission's action on a variety of substantive and procedural grounds. On the merits it urges that the rules impose improper restrictions on freedom of speech, that they are unconstitutionally vague and that they are otherwise arbitrary and unreasonable. Procedurally, it contends that an evidentiary hearing was required before the rules could become effective as to individual licensees; that the notice given was inadequate; and that the Commission erroneously relied on data not included in the comments filed in the rule making. We will show that the Commission action was a reasonable one, lying well within its permitted discretion, and that the proceeding before the agency was in complete accord with the procedures prescribed by statute.

I. IT IS CLEARLY WITHIN THE COMMISSION'S AUTHORITY TO SPECIFY THE USE TO WHICH FREQUENCIES ALLOCATED TO THE CITIZENS RADIO SERVICE CAN BE PUT; AND ITS RULES PLACING REASONABLE LIMITATIONS ON THE KIND OF COMMUNICATIONS WHICH MAY BE TRANSMITTED DO NOT VIOLATE THE FIRST AMENDMENT OR SECTION 326 OF THE COMMUNICATIONS ACT.

There is no merit to petitioner's argument that the new rules, specifically Section 95.83, by prohibiting certain kinds of transmissions, violate the First Amendment and Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. Section 326.[4/] Ruling on substantially the same question the Court of Appeals for the Second Circuit upheld the Commission's contention that the rules

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4/ Section 95.83 lists some sixteen kinds of prohibited transmissions. Those petitioner finds objectionable are set forth at pp. 33-35 of its brief. §95.83 is printed in the Appendix attached hereto.

involved no abridgment of the right of free speech:

> [Petitioner's] argument is that in a service available to all citizens for business and personal activities generally, citizens must be allowed to say whatever they please, save for such few restrictions as the First Amendment permits. But this ignores that "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all." National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). There are now 700,000 Class D licensees utilizing the 23 available frequencies, and several thousand are added each month. Here is truly a situation where if everybody could say anything, many could say nothing. The very absence of restrictions on the number of users may demand more restrictions on the use. Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278, 281, (1965).

This decision is wholly in accord with other cases construing the Commission's authority in this area and should, we believe, be regarded as controlling here.

Sections 303(a) and (b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 303(a) and (b) empower the Commission to classify radio stations and to prescribe the nature of the service to be rendered by each class of licensed station. In addition, it has been settled law for many years that the Commission in the exercise of its power to "encourage the larger and more effective use of radio," Communications Act of 1934, Section 303(g), 47 U.S.C. Section 303(g), has the power to impose certain limitations on the use of the public airwaves. Thus, in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Supreme

Court rejected a First Amendment challenge to the Commission's chain broadcasting rules, observing that "The facilities of radio are limited and therefore precious;" and "cannot be left to wasteful use without detriment to the public interest." 319 U.S. at 216. Emphasizing (in the language quoted in Lafayette, supra) that radio is not available to anyone who wishes to use it, the opinion states:

> That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. * * * The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engaged in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of 'public interest'), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license." Id. at 226-227.

The decision also expressly confirmed the Commission's power to restrict use of the airwaves to certain kinds of radio traffic:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication . . . the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. Id. at 215-216. 5/

In the exercise of this authority, the Commission has created some forty special services of which the Citizens Service

5/ Petitioner's suggestion that overcrowding of the available spectrum space is no longer as serious a problem as it was when NBC was decided is contrary to fact. Overcrowding in the land mobile services (of which the Citizens Service is one) has become so severe in recent years that the Commission has established a special committee to explore possible solutions. 29 Fed. Reg. 4818 (1964); Annual Report of the Federal Communications Commission for 1965, pp. 133, 173. Bendix Aviation Corp. v. Federal Communi-
(cont'd)

is one. These services differ from broadcast and common carrier services in that the allocated frequencies are shared among users rather than assigned on an exclusive basis.[6] Because requests for the limited spectrum space far exceed the available frequencies, the Commission has been forced to establish priorities, limit eligibility to hold licenses, and restrict the use of stations in these services to specified purposes and types of communications which will be most beneficial to the public and assure the most effective uses of the very limited frequency space. For example, the Aviation Radio Service was created to fulfill radio communications requirements in connection with air traffic and related aviation needs, and the rules prohibit messages unrelated to those needs, 47 CFR 87.123. Comparable provisions apply to other services. See, e.g., 47 CFR 91.151; 93.151 and 97.113 et seq. for analogous regulations in the Industrial Radio Service, the Land Transportation Radio Service and the Amateur Service, respectively.

The Class D category in the Citizens Service was created to bring the advantages of radio to the general citizenry for

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5/ (cont'd) cations Commission, 272 F.2d 533, (D.C. Cir., 1959), cert. denied sub nom. Aeronautical Radio, Inc. v. United States, 361 U.S. 965, presents an example of the difficult problems still arising from the inadequacy of spectrum space. See also Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (D.C. Cir., 1963) cert. denied, 375 U.S. 951 and Idaho Microwave Corp. v. Federal Communications Commission, 352 F.2d 729 (D.C. Cir., 1965) where restrictions on the content of radio transmissions were upheld largely on the authority of NBC.

6/ The vast number of licensees in these services makes it essential that the available frequencies be shared. At the same time sharing represents a feasible arrangement since the legitimate needs of the users are more apt to be intermittent than continuous.

substantive business or personal communications needs. However, more than 800,000 licensees must share the 23 frequencies available. It therefore becomes self-evident, as the Court recognized in Lafayette supra, that heavy restrictions must be placed on the kind of use to which the frequencies may be put. Since the purpose of the Citizen Band has never been hobbying or long distance communication, the Commission properly acted to exclude these and other extraneous kinds of transmissions. To act otherwise, the Commission concluded, would be to render the service useless to the large number of licensees whom the Commission has found use the service properly, and who stand in real need of its availability. 7/

The other restrictions about which petitioner complains were in substance a part of the rules prior to the present rule making cf. 25 Fed. Reg. 1411 (1960). Like similar prohibitions in other services, their objective is to keep the use to which the frequencies are put within bounds that are consistent with the purposes for which the service was established. Petitioner has failed to show that these limitations are in any way unreasonable or contrary to the public interest standard of the Communications Act. This

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7/ This is not to say that the Commission has prohibited the use of radio as a pastime or hobby. On the contrary, through its Amateur Service, the Commission has authorized and encouraged this kind of activity. And it specifically urged Citizens Band licensees who wished to pursue it to apply for licenses in this service. The rule under review herein simply requires licensees in the Citizens Service to forego the transmission of communications which are inconsistent with the purposes of the Service. In its Report and Order, the Commission noted that conversion of citizens band equipment to amateur use is generally feasible at very modest cost (R. V. II-C, p. 781).

being so, they cannot be regarded as a denial of free speech. National Broadcasting Company v. United States, supra at 227.

The contention that Section 95.83 is unconstitutionally vague is also without merit. This is particularly so when the rule is considered in the framework of the history of Citizens Band regulation and in light of the many Commission efforts to inform Citizens Band licensees of the legal restrictions on the use of their equipment.

In the first place, the rule on its face seems perfectly clear, setting forth some sixteen kinds of prohibited transmissions. Moreover, the rule works no material change in the substantive policy which has prevailed in Citizens Band service since its inception in 1947. As we have shown supra, pp. 3-6, hobbying and other uses unrelated to the licensee's business or personal affairs have never been permitted in the service. Furthermore, each applicant for a license must certify in writing (on his application) that he has read the applicable rules, and understands them. For the past several years, a bulletin has been sent with substantially every new license advising of the permissible uses in this service, and many public notices and bulletins have been issued on the subject. Several decisions of the Commission have dealt with prohibited users.[8/] And public notices of enforcement actions taken by the Commission are regularly mailed to many citizens radio clubs.

It is therefore difficult to accept petitioner's contention

8/ Warren G. Holleman, 34 FCC 121, 23 Pike & Fischer, R.R. 539 (1963); Vincent R. Banville, 35 FCC 604 (1963).

that a licensee who is making a good faith effort to comply with the rules would find their substance unascertainable. In addition, whenever enforcement action is instituted, the licensee is first warned about the transmissions which are in violation of the rules, and given an opportunity to bring his operations into compliance with them.

Arguments similar to petitioner's were squarely rejected by the United States Court of Appeals for the Second Circuit in Lafayette, supra. "The FCC is not to be faulted," said the court, "simply because ingenuity can imagine borderline cases where a conscientious licensee might have fair doubt whether his communications were banned or not." Lafayette Radio Electronics, Inc. v. Federal Communications Commission, 345 F.2d at 281-2 (1965). When the licensee is in doubt, noted the Court, he need only inquire, pursuant to the provisions of 47 CFR 1.2 (1966) which provides for the issuance of declaratory rulings. Moreover, as the Court observed, the sanction of revocation or fine,47 U.S.C. Sections 312, 510 is customarily imposed only after adequate warning and opportunity to rectify the problem save in the most flagrant cases.

In sum, we submit that the rules are clearly comprehensible by a man of average intelligence who is in good faith attempting to adhere to them. They are reasonable on their face and are rationally calculated to serve the public interest; as such they violate neither the First Amendment nor Section 326 of the Act.

II. THE PROCEDURE FOLLOWED BY THE COMMISSION COMPLIED WITH ALL APPLICABLE STATUTORY REQUIREMENTS

A. The Communications Act Did Not Require the Commission To Hold Evidentiary Hearings On Individual License Modifications Before Adopting Rules Of General Applicability To The Citizens Radio Service.

Among the rules adopted was an amendment to Section 95.41(d) and a new Section 95.91(b). Section 95.41(d) as it existed prior to the proceeding here under review assigned 23 frequencies to Class D Citizens Band use. These frequencies were intended primarily for intrastation use, and only secondarily for interstation communication, in conformity with the basic purpose of the Citizens Band Service. Under the amendment, the same 23 frequencies remain available, but interstation use is limited to only seven specified frequencies. Former Section 95.81(f) provided for a maximum transmission length of five minutes with a two minute silent period after each exchange in interstation use. The new Section 95.91(b), retains the five minute limit on transmission, but lengthens the silent period from two to five minutes. In addition, Section 95.83(b) established a firm 150 mile limit on the range of transmissions, and Section 95.13, prohibited unincorporated associations from holding licenses.

These changes, alleges petitioner, violate Section 303(f) of the Communications Act, 47 U.S.C. Section 303(f) which requires that the Commission either obtain a licensee's consent or hold a

hearing before "changes in the frequencies, authorized power, or in the time of operation of any station . . ." can be effectuated. Petitioner also relies on Section 316 of the Act, 47 U.S.C. Section 316, which provides that the holder of a license or permit be afforded a public hearing on request before a modification can be effected in the terms of his license.

The Commission considered these claims in some detail and concluded that under the circumstances a further evidentiary-type hearing was not required (R. Vol. II-B pp. 1092-1095). Essentially it was the Commission's position that the rules did not involve the kind of operating changes contemplated by Section 303(f) but that in any event no evidentiary hearing was required either by that section or Section 316(a) since all affected parties had been afforded the opportunity to submit their views and since no substantial or material questions of fact existed which would warrant exploration in an adjudicatory hearing. In addition, the Commission noted that because of the very large number of licensees in the service it would be "impracticable, if not impossible" to obtain individual consent to the rules or to afford separate hearings. Petitioner has failed to show that this disposition was in any sense unreasonable or contrary to law.

It is clear beyond question that the actions under review in this case were directed not to individual licensees; rather they were remedial and prospective only, of general effect, and

designed to implement broad policy determinations. In every respect, then, they were legislative in character. Like many regulatory actions, they serve to prohibit or restrict activities which might otherwise be performed by licensees, but this does not, as petitioner seems to contend, constitute a modification of operating authority such as to require formal license amendment proceedings.

Licenses issued in the Citizens Service expressly state that the privileges granted are "subject to the provisions of the Communications Act of 1934, as amended, subsequent acts, treaties and all regulations heretofore or hereafter made by the Commission . . ." (Emphasis added.) Essentially, the rules in question here specify more stringent requirements in order to eliminate widespread abuses and to permit all licensees to utilize the frequencies in accordance with the purposes for which the licenses were issued. As such, we believe they represent reasonable restrictions which can be imposed by rule making. Cf. Great Lakes Airlines v. Civil Aeronautics Board, 291 F.2d 354, 367 (9th Cir., 1961) cert. denied, 368 U.S. 890; American Trucking Ass'n. v. United States, 344 U.S. (1953).

Prior to the adoption of the rules, the Commission held a rule making hearing in full conformance with the procedural provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003. And it is well settled that this kind of proceeding is adequate where the promulgation of standards of general applicability

is involved even where there may be a statutory right to a hearing before an individual application may be denied or a license modified.[9/] Federal Power Commission v. Texaco, Inc., 377 U.S. 33, (1963); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966); Superior Oil Co. v. Federal Power Commission, 322 F.2d 601 (9th Cir., 1965); Airline Pilots Ass'n., International v. Quesada, 276 F.2d 892 (2nd Cir., 1960). Each of these cases involved statutes with hearing requirements substantially the same as those relied on by petitioner here but in each instance it was concluded that "the 'hearing' granted under §4(b) of the Administrative Procedure Act is adequate" to fulfill the statutory requirement. Federal Power Commission v. Texaco, Inc., supra at 39.

In Air Line Pilots Association, International v. Quesada, supra, the court was faced with a challenge similar to petitioner's here. In that case the Administrator of the Federal Aviation Authority had altered the rules affecting the outstanding certificates of air line pilots. Said the court:

9/ Of course, in circumstances where Commission action will affect in a profound way the rights of an individual broadcast licensee, an adjudicatory type hearing is clearly required. See Federal Communications Commission v. National Broadcasting Co. (KOA) 319 U.S. 239 (1943); Cf. Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265 (1949).

> Nor does the regulation violate due process because it modified pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. * * * Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectivly to discharge his duties. All changes in certificates would be subject to adjudicatory hearings, including appeals to the courts, and each pilot whose license was affected - here some 18,000 - might demand to be heard individually. 276 F.2d at 896.

Similarly, in National Broadcasting Co. v. United States, 319 U.S. 190 (1940), the Supreme Court sustained the validity of the "chain broadcasting" regulations which were adopted, without adjudicatory hearings, in the middle of the current license terms. Many licensees were thereby affected in ways far more profound than is the instant petitioner. But the Court held that the Commission had the right, and the duty, to issue regulations in the public interest.

And in the recent case of American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966) the Court of Appeals for the District of Columbia upheld a CAB rule making procedure whose effect was to withdraw from combination (cargo and passenger) carriers, the right to offer certain "block space" reduced cargo rates to shippers, notwithstanding a provision of

the Federal Aviation Act[10] which required a hearing of an adjudicatory nature before an outstanding certificate could be modified. The Court found that since the regulation in question was legitimately general in nature, the certificate holders were entitled to no more procedural protection than that provided by a rule making hearing pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. Section 1003. In supporting the CAB's reliance on rule making the Court noted that Congress had given the Board not only a wide regulatory authority, but also a specific promotional function to initiate proposals for the purpose of expanding efficient civil aviation transportation, the power to classify carriers and service, and the power to issue implementing rules and regulations.[11] The Federal Communications Commission operates under similar statutory mandates.[12]

As in Quesada, the Court made clear that adjudicatory hearings are unnecessary when the modification takes place not as a particularized action against an individual licensee, but as a consequence of a bona fide rule, whose purpose is to affect a large

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10/ Section 401(g) of the Federal Aviation Act, 49 U.S.C. Section 1371(g).

11/ See 49 U.S.C. Sections 1302(f), 1354(a), 1386(a).

12/ See Communications Act of 1934, as amended, Sections 303(a), (b), (f), (g), (r), 47 U.S.C. Sections 303(a), (b), (f), (g), and (r).

class of licensees in furtherance of the public interest.[13] In such a case, a licensee is entitled only to notice, and an opportunity to submit his views and have them considered. Petitioner has been afforded these rights and there is nothing in the language or legislative history of Sections 303(f) and 316 to indicate that more is required.[14]

Here, as we have pointed out, the regulations affect a class of licensees numbering in the hundreds of thousands. After exhaustively examining and evaluating the mass of material filed with it, the Commission had the benefit of every possible point of view, and every kind of factual data which might have some relevance to the issues. All that remained were the policy determinations, i.e., questions of law. There were no substantial or material questions of fact in the resolution of which an evidentiary hearing would be useful. Cf. National Broadcasting Company v. Federal Communications Commission, __ F.2d __, D.C. Cir., Case No. 19,523, decided May 26, 1966; Capital Broadcasting Co. v.

13/ The same Court has recently reaffirmed this view in Flying Tiger Line, Inc. v. Murphy, Case No. 19,869, affirming a District Court opinion which rejected a contention that the CAB had wrongfully deprived Flying Tiger of certain privileges without the adjudicatory hearing required by law. D.C. Cir., Per Curiam Judgment dated June 2, 1966.

14/ Discussing approvingly the use of rule making procedures wherever possible, the Court in American Airlines, supra, noted that "(S)uch rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making." 359 F.2d at 629.

Federal Communications Commission 367 F.2d 592 (D.C. Cir., 1963). Significantly, petitioner does not inform this Court what further matters it wishes to raise in the requested hearings, and there is nothing in the record to indicate that a hearing might produce further useful evidence.

Nor has petitioner been deprived of any constitutional rights of due process of law. As we have shown above, petitioner had every procedural opportunity to which it was entitled in a valid rule making procedure. It is settled that the Constitution does not require more. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915). See Superior Oil Co. v. Federal Power Commission, supra, at 614-617; Willapoint Oysters v. Ewing, supra, at 692-694.

In sum, there is no question as to the Commission's substantive authority to specify the frequencies, time of operation, etc. of Citizens Service licensees. Nor have special circumstances been alleged which would warrant waiver of the rules. Under similar circumstances this Court has held that affected persons are no more entitled to an evidentiary hearing on the merits of a regulation than would have been the case if the adopted standard had been expressed in the statute rather than by rule. Superior Oil Co. v. Federal Power Commission, 322 F.2d at 619. Clearly the same result should obtain here.

B) Petitioner Had Adequate Notice Of The Substance Of The Proposed Rules.

It is argued (Petitioner's Br., pp. 59-61) that the Notice of Proposed Rule Making in this case was inadequate in that it failed to inform petitioner of the amendment to Section 95.1 as finally adopted, and made other changes without proper notice.

Section 4(a) of the Administrative Procedure Act, 5 U.S.C. section 1003(a) prescribes the notice required in rule making proceedings such as that involved here.

> "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

The essential element of adequate notice is that it "fairly apprise interested persons of the issues involved, so that they may present relevant data or argument." H. Rept. No. 1980, 79th Cong., 2d Sess. 24; see also S. Rept. No. 752, 79th Cong., 1st Sess. 14. We submit the Commission's Notice of Proposed Rule Making met this standard.

In its Notice, the Commission adverted specifically to the long standing prohibition of hobbying in the Citizens Band Service. 27 F.R. 11500. It was also noted that the proposed amendments were designed to make more apparent the permissible and prohibited uses.

Clearly this notice was sufficient in that it contained "the substance of the proposed rule or a description of the subject and issues involved." Petitioner had ample opportunity to bring to the attention of the Commission whatever evidence or views it thought relevant to the issues. The provisions of changed 95.1 were actually adopted in lieu of more detailed limitations on permissible communications originally proposed as Section 19.61 (95.81) in the Notice of Proposed Rule Making. In addition, the change was entirely consistent with other proposals contained in the Notice. For the same reason petitioner's claim that other provisions were adopted without adequate notice is without merit.

We do not read the Administrative Procedure Act to require an agency to publish in advance every precise proposal which may be ultimately adopted. Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir. 1965); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 684 (9 Cir. 1949), cert. denied 338 U.S. 860 (1949). See also, Wilson and Co. v. United States, 335 F.2d 788 (7th Cir. 1964), cert. denied 380 U.S. 950; Owensboro On The Air, Inc. v. United States, 262 F.2d 702 (D.C. Cir., 1958); Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir., 1954). As the Court of Appeals states in Logansport:

> "Surely every time the Commission decided to take account of some additional factor it was not required to start the proceeding all over again.

> If such were the rule, the proceedings might never be terminated." 210 F.2d at 28.

And this Court has said, in Pacific Coast, supra:

> "Since the Commission was proceeding in the area where rule making was not required to be made 'on the record,' the notice and hearing requirements of Section 4(b) of the Administrative Procedure Act were met if the Conference had notice and an opportunity to present its views to the Commission." 350 F.2d 197, 206.

In sum, there is no substantial doubt as to the adequacy of notice under the Administrative Procedure Act.

C) The Record Is Adequate To Support The Commission's Action.

Petitioner further argues (Br., pp. 21-25) that additional material should have been made a part of the record,[15] and that without it the Court cannot determine whether the Commission's decision is supported by substantial evidence. Petitioner points to several instances wherein the Commission referred, either in its Notice of Proposed Rule Making or in the Report and Order adopting the rules to "operational experience over the years" and to "monitoring, inspections and investigations" conducted by Commission personnel.[16]

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[15] Petitioner has previously moved this Court for an order to include in the record certain materials. The Commission filed an Opposition, and the Court entered an Order on December 21, 1965, denying the motion without prejudice to a further consideration of the question when the cause is heard on the merits.

[16] The increased evidence of overcrowding and disregard for the rules in the Citizens Service has long been a matter of public record. See, e.g., Federal Communications Commission Annual Report, pp. 84-85 (1960); Federal Communications Commission Annual Report, p. 83 (1961); Federal Communications Commission Annual Report, p. 101 (1963); Federal Communications Commission Annual Report, pp. 90, 98, (1964).

It argues that this data should have been included in the record so that it could be subject to rebuttal and examined by a reviewing court.

At the outset we point out that no request for this data was ever made to the Commission. The matter is therefore not properly before the Court and may not be considered. 47 U.S.C. 405; Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492 (1955); United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952); Unemployment Compensation Commission of Alaska v. Oregon, 329 U.S. 143, 155 (1946); Florida Gulf Coast Broadcasters, Inc. v. Federal Communications Commission, 352 F.2d 726 (D.C. Cir. 1965).

The allegation is, in any event, wholly without merit. There is no requirement that the proceeding conducted by the Commission be "on the record," and accordingly sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1006, 1007 and the case law upon which petitioner relies are totally inapposite.[17/] The Commission's action was rule making in the broadest sense. Since this is essentially a legislative process, the agency need not proceed on evidence formally presented at hearings, and could properly "act on the basis of data contained in its own files, on

17/ Thus, Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir., 1964) upon which petitioner principally relies, is not in point. Section 10(b) of the Walsh-Healey Act, 66 Stat. 308, 41 U.S.C. Sec. 43(a), on which the court relied, requires the Secretary's determinations to be made "on the record after opportunity for a hearing." 337 F.2d at 521.

information informally gained by members of the body, on its own expertise, or on its own views or opinions. It is not necessary for the regulatory agency to cause to be submitted at hearings evidence that would support its rulemaking decisions." Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 892, (D.D.C., 1965), affirmed sub nom. Flying Tiger Line, Inc. v. Murphy, Case No. 19,869, D.C. Cir., decided by Judgment Order issued June 2, 1966. Pacific Coast European Conference v. United States, supra at 205. Indeed in the notice of proposed rule making herein the Commission expressly stated that it proposed to take into account "other relevant information before it, in addition to specific comments invited by this notice." (R. Vol. I-A, p. 5, 27 Fed. Reg. 11501).

Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b) states, in part: " . . . after consideration of all relevant matters presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose." All that is necessary is that the Commission comply with this requirement. Manifestly, it has done so here. As this Court has stated:

> In determining the propriety of rules of general application only a legal question is presented - whether on the factual premise upon which the Commission acted the rule promulgated is unreasonable, arbitrary, capricious or discriminatory. If the factual premise itself were open to review, then it would be necessary for all general rule-making to include a trial-like hearing. Superior Oil Co. v. Federal Communications Commission, supra at 619. Accord, Willapoint Oysters v. Ewing, supra; Van Curler Broadcasting Corp. v. United States, 236 F.2d 727, 730 (D.C. Cir., 1956).

By its request for additional "evidence," petitioner is simply seeking to litigate the factual premise on which the Commission acted. This it may not do.

CONCLUSION

For the foregoing reasons the orders here under review should be affirmed.

Respectfully submitted,

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September 15, 1966

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM L. FISHMAN,
Counsel.

APPENDIX A

Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003.

Section 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts--

(a) NOTICE.--General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.--After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

[Sections (c) and (d) omitted]

Sections 303 (a), (b), (f) and (g), 316, 326 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 303 (a), (b), (f) and (g), 316, 326 and 405.

Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall--

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission. [Footnote omitted]

Section 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. [Footnote omitted]

Section 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402 (b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order. [Footnote omitted]

Section 95.83 of the Commission's Rules and Regulations, 47 CFR §95.83.

Subpart D--Station Operating Requirements

SOURCE: The provisions of this Subpart D appear at 29 F.R. 11108, July 31, 1964, except as otherwise noted.

§95.83 Prohibited uses.

(a) A Citizens radio station shall not be used:

(1) For engaging in radio communications as a hobby or diversion, i.e., operating the radio station as an activity in and of itself.

[Note omitted]

(2) For any purpose, or in connection with any activity, which is contrary to Federal, State, or local law.

(3) For the transmission of communications containing obscene, indecent, or profane words, language, or meaning.

(4) To carry communications for hire, whether the remuneration or benefit received is direct or indirect.

(5) To communicate with stations authorized or operated under the provisions of other parts of this chapter, with unlicensed stations, or with United States government or foreign stations, except for communications pursuant to §§95.85(b) and 95.121.

(6) For any communication not directed to specific stations or persons, except for: (i) Emergency and civil defense communications as provided in §§95.85(b) and 95.121, respectively, (ii) test transmissions pursuant to §95.93, and (iii) communications from a mobile unit to other units or stations for the sole purpose of requesting routing directions, assistance to disabled vehicles or vessels, information concerning the availability of food or lodging, or any other assistance necessary to a licensee in transit.

(7) To convey program material for retransmission, live or delayed, on a broadcast facility.

[Note omitted]

(8) To interfere maliciously with the communications of another station.

(9) For the direct transmission of any material to the public through public address system or similar means.

(10) To transmit superfluous communications, i.e., any transmissions which are not necessary to communications which are permissible.

(11) For the transmission of music, whistling, sound effects, or any material for amusement or entertainment purposes, or solely to attract attention.

(12) To transmit the word "MAYDAY" or other international distress signals, except when a ship, aircraft, or other vehicle is threatened by grave and imminent danger and requests immediate assistance.

(13) For transmitting communications to stations of other licensees which relate to the technical performance, capabilities, or testing of any transmitter or other radio equipment, including transmissions concerning the signal strength or frequency stability of a transmitter, except as necessary to establish or maintain the specific communication.

(14) For relaying messages or transmitting communications for a person other than the licensee or members of his immediate family, except: (i) Communications transmitted pursuant to §§95.85(b), 95.87(b)(7), and 95.121; and, (ii) upon specific prior Commission approval, communications between citizens radio stations at fixed locations where public telephone service is not provided.

(15) For advertising or soliciting the sale of any goods or services.

(16) For transmitting messages in other than plain language. Abbreviations, including nationally or internationally recognized operating signals, may be used only if a list of all such abbreviations and their meaning is kept in the station records and made available to any Commission representative on demand.

(b) A Class D station may not be used to communicate with, or attempt to communicate with, any unit of the same or another station over a distance of more than 150 miles.

(c) A licensee of a Citizens radio station who is engaged in the business of selling Citizens radio transmitting equipment shall not allow a customer to operate under his station license. In addition, all communications by the licensee for the purpose of demonstrating such equipment shall consist only of brief messages addressed to other units of the same station.

[29 F.R. 11108, July 31, 1964, as amended at 30 F.R. 2712, Mar. 3, 1965]